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In The Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFFS ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY*
**Counsel of Record*
CHRISTOPHER T. MASSEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Clean Water Act's prohibition on unpermitted discharges to "navigable waters" extends to nonnavigable wetlands that do not even abut a navigable water?

2. Whether the extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceeds Congress' constitutional power to regulate commerce among the States?

LIST OF PARTIES

Petitioners:	Prodo, Inc.; Rolling Meadows Hunt Club; and Pine River Bluff Estates, Inc., are wholly owned by John A. Rapanos and Judith A. Nelkie Rapanos. Petitioner companies have no parent company and no publicly held company owns 10 percent or more of Petitioners' stock.
Respondents:	United States of America.
Amicus Curiae:	Mountain States Legal Foundation.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners: John A. Rapanos; Judith A. Nelkie Rapanos; Prodo, Inc.; Rolling Meadows Hunt Club; and Pine River Bluff Estates, Inc. (collectively, "the Rapanos"). Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Clean Water Act, are implemented and

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

enforced in a manner consistent with the Constitution of the United States.

INTRODUCTION

The Rapanos are accused of filling wetlands on their several properties without a federal permit in purported violation of section 404(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(a). The properties at issue entail non-navigable, intrastate wetlands that do not abut traditional navigable waters, but instead are separated, by as far as 20 miles, from the nearest navigable waters. Yet, despite that these remote wetlands are not adjacent to waters of the United States and have only attenuated connection to navigable waters, the federal government has asserted jurisdiction under section 404 of the CWA over these properties of the Rapanos.

To the detriment of private land owners and in conflict with the authority of States to regulate their own land, the federal government has employed an expansive interpretation of its jurisdiction over "waters of the United States." The federal government now interprets its jurisdictional authority under the CWA to include "adjacent waters" of wetlands where the only purported nexus between the wetlands and navigable waters is the mere presence of a hydrological connection. Pet. App. A16. Such an expansive interpretation of the CWA has never been sustained by this Court and was rejected in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). Moreover, the federal government's interpretation of its jurisdictional authority under the CWA raises serious constitutional

questions and has created a distinct conflict among the Courts of Appeals and confusion among administrative agencies and the States that only this Court can resolve.

ARGUMENT IN SUPPORT OF PETITION

I. THE SIXTH CIRCUIT'S RULING, EXTENDING CLEAN WATER ACT JURISDICTION TO ISOLATED, INTRASTATE WETLANDS WITH ANY HYDROLOGICAL CONNECTION TO NAVIGABLE WATERS, EXCEEDS CONGRESS' POWER UNDER THE COMMERCE CLAUSE AND INTRUDES ON TRADITIONAL STATE RIGHTS.

The Sixth Circuit, in upholding the federal government's regulation of remote wetlands on the Rapanos' properties, has misinterpreted the jurisdictional limitations of the CWA.[2] The current federal regulations provide

[2] The CWA requires landowners to obtain permits from the U.S. Army Corps of Engineers ("Corps") before they discharge fill material into "navigable waters." 33 U.S.C. § 1344(a). Congress has defined "navigable waters" as "waters of the United States, including the territorial seas." *Id.* at § 1362(7). The Environmental Protection Agency ("EPA") and the Corps have defined "waters of the United States" to include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce[ ];

(Continued on following page)

a very broad definition of "waters of the United States," encompassing wetlands adjacent to other bodies of water (other than waters that are themselves wetlands). *See,* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. However, federal regulations are far more explicit in defining "adjacent" as "bordering, contiguous, or neighboring," 33 C.F.R. § 328.3(c), and "adjacent wetlands" as "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like," *Id.* Yet, the Sixth Circuit concluded that isolated, intrastate wetlands on the Rapanos' properties are subject to federal control under the CWA because of the presence of a "hydrological connection" establishing a "significant nexus between the wetlands and 'navigable waters.'" Pet. App. A16. The Sixth Circuit reached this conclusion despite acknowledging that the wetlands on the Rapanos' properties are not physically adjacent to, or directly abutting, any navigable water. If the federal government may regulate all waters with a hydrological connection to any navigable water, no matter how tenuous or remote the connection, there is virtually no land that the government

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(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a) (Corps); *see also,* 40 C.F.R. § 122.2 (EPA). The term "adjacent" is also defined as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). Finally, "adjacent wetlands" include "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." *Id.*

may not regulate through its power under the Commerce Clause.

The Sixth Circuit's holding disregards totally this Court's Commerce Clause jurisprudence and will, if allowed to stand, permit the federal government to utilize the CWA to regulate private property in every State with no constitutional limit. Moreover, this broadening of federal jurisdiction under the CWA does not just limit the rights of landowners; it encroaches upon the very rights of the states themselves to regulate lands within their borders. Land-use planning, regulation, and zoning are not enumerated powers granted to the federal government. They are the basic, fundamental functions of local governmental entities. Authority over these functions is reserved, traditionally, to the States under the Tenth Amendment. *See, SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"); *see also,* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water. . . .").

In *United States v. Lopez*, this Court suggested that, whenever Congress attempts to regulate areas traditionally regulated by state or local governments, including the rights of private property owners, this Court will review that legislation with caution. 514 U.S. 549, 557-68 (1995). Foretelling the scrutiny it would apply, this Court rejected, in *Lopez*, the "costs of crime" and "national productivity" justifications for the Gun-Free School Zones Act ("GFSZA") proffered by Congress both because, had it accepted those justifications, it would be "difficult to

perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign," *id.* at 564, and because such a broad reading of the Commerce Clause would undermine the federal system of government. *Id.* at 561, n.3, 564, 567-68.

Likewise, in *SWANCC*, congressional authority under the Commerce Clause was tested. In *SWANCC*, this Court addressed whether the EPA and the Corps could regulate isolated intrastate waters and wetlands that are not connected or adjacent to navigable waters "based on their actual or potential use as habitat for migratory birds." *SWANCC*, 531 U.S. at 163-64. This Court held that the migratory bird regulation was invalid because Congress did not intend to include "isolated" wetlands or waters within the term "navigable waters" when it enacted the CWA. *Id.* at 162-63.

Although the *SWANCC* decision did not decide whether federal regulation of isolated intrastate wetlands exceeded congressional authority under the Commerce Clause, this Court did suggest that the Corps' interpretation may have exceeded that authority. *Id.* at 172-73. This Court indicated that the Corps' regulation of isolated intrastate wetlands would raise serious questions under the Commerce Clause because local land use regulation is a traditional state and local function. *Id.* at 172-74. Even though previous rulings had found that migratory bird protection was a "national interest of very nearly the first magnitude," this Court determined it was "not clear" whether the regulated activity or object, in the aggregate, affects interstate commerce. *Id.* at 173 (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). Because there was no clear statement in the CWA that Congress intended to give

the federal government authority over isolated wetlands, this Court refused to interpret the regulation to include "federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

Because local land use and private property rights are necessarily intertwined, this Court's holdings in *Lopez* and *SWANCC* control in this matter. The Sixth Circuit's extension of federal jurisdiction under the CWA to isolated, intrastate wetlands that do not abut traditional navigable water substantially intrudes on the rights of the Rapanos, as private landowners, and on the sovereign power of the State to control local land. Justice Kennedy, concurring in the *Lopez* decision, argued that courts should be hesitant to allow Congress to use the Commerce Clause as its basis for federal regulation in an "area of traditional state concern" that "States lay claim [to] by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring). Justice Kennedy elaborated that, with such an expansive definition of the Commerce Clause, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

Accordingly, the Sixth Circuit's upholding of the federal government's regulation of isolated, intrastate wetlands, such as the Rapanos' property, intrudes unconstitutionally on the rights of private landowners to use their land and the responsibilities of States to regulate local land use. The repercussions of such unbounded federal authority over "waters of the United States" are far-reaching and substantial. Without this Court's clarification, the rights of private land owners and the authority

of States to regulate their own land shall remain unconstitutionally burdened. Thus, this Court should grant the Petition.

II. ONLY THIS COURT MAY RESOLVE THE CONFLICT AND CONFUSION AMONG THE COURTS OF APPEALS, ADMINISTRATIVE AGENCIES, AND STATES OVER THE SCOPE OF FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT.

In holding that isolated, intrastate wetlands on the Rapanos' properties are subject to federal control under the CWA because of the presence of a "hydrological connection" establishing a "significant nexus between the wetlands and 'navigable waters,'" Pet. App. A16, the decision of the Sixth Circuit attests to the conflict and confusion over the scope of federal jurisdiction under the CWA following this Court's decision in *SWANCC*. The federal government's interpretation of its jurisdictional authority under the CWA raises serious constitutional questions and has created a distinct conflict among the Courts of Appeals and confusion among administrative agencies and the States that only this Court may resolve.

A. There Is A Split In The Courts Of Appeals Following *SWANCC*.

In this case, the Sixth Circuit has adopted a narrow construction of this Court's decision in *SWANCC*. Indeed, the Sixth Circuit noted that "the majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no hydrological connection with navigable waters, it does reach inland

waters that share a hydrological connection with navigable waters."[3] Pet. App. A14-A15. Under the Sixth Circuit's interpretation, and contrary to precedent of this Court, physical adjacency between a wetland and navigable water is not required to establish CWA jurisdiction.[4] *See*, Pet. App. A14. The presence of any hydrological connection, no matter how slight, then is enough to establish a "significant nexus between the wetlands and 'navigable waters,'" which is all that the Sixth Circuit would require for federal CWA jurisdiction over "adjacent waters." Pet. App. A16.

However, the Fifth Circuit construed *SWANCC* broadly in *Rice v. Harken Exploration Corp.*, 250 F.3d 264, 269 (5th Cir. 2001), noting that, according to this Court's reasoning in *SWANCC*, a body of water is subject to CWA jurisdiction only if it "is actually navigable or is adjacent to an open body of navigable water." Although *Rice* addressed the Oil Pollution Act ("OPA"), the Fifth Circuit held that the phrase "navigable waters" has the same meaning in the OPA as it does in the CWA. *Id.* at 267.

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[3] The Sixth Circuit noted a narrow interpretation of *SWANCC* in the following cases: *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407, 415 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Rueth Development Company*, 335 F.3d 598, 604 (7th Cir. 2003), *cert. denied*, 540 U.S. 1050 (2003); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533-34 (9th Cir. 2001).

[4] *See, United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-39 (1985) (holding that federal jurisdiction under the CWA extended to wetlands adjacent to navigable waters); *SWANCC*, 531 U.S. at 167-68 (explaining this Court's decision in *Riverside Bayview Homes*).

The Fifth Circuit reaffirmed its broad interpretation of *SWANCC* in *In re Needham*, 354 F.3d 340 (5th Cir. 2003). Like *Rice*, *In re Needham* involved the OPA, and like *Rice*, *In re Needham* noted that the OPA's definition of "navigable waters" is "co-extensive with the definition found in the [CWA]." *In re Needham*, 354 F.3d at 344. The Fifth Circuit rejected the government's argument that the OPA covered "all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *Id.* at 345 (citing 40 C.F.R. § 300.5). *In re Needham* held that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *Id.* As noted by the Sixth Circuit, the *In re Needham* decision conflicts with decisions from the Fourth, Sixth, Seventh, and Ninth Circuits concluding that, under *SWANCC*, "water exhibiting a hydrological connection with 'navigable water' should be considered part of the 'waters of the United States.'" Pet. App. A14.

These varying interpretations of *SWANCC* have resulted in a split of authority among the Courts of Appeals as to whether federal jurisdiction under the CWA extends to intrastate, nonnavigable wetlands that do not abut traditional navigable waters. Thus, to resolve this conflict involving an important question of law, this Court should grant the Petition.

B. The Response Of The Corps And EPA To *SWANCC* Fails To Resolve The Dispute Over Federal CWA Jurisdiction.

On January 19, 2001, ten days after this Court issued its decision in *SWANCC*, the Corps and EPA published a joint memorandum of agreement narrowly interpreting

federal CWA jurisdiction in light of the decision. *See*, Joint Memorandum, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters, 68 Fed. Reg. 1,995 (January 15, 2003), *available at* http://www.epa.gov/owow/wetlands/guidance/SWANCC/Joint_Memo.pdf. That memorandum provides guidance to Corps field personnel that they should continue to assert jurisdiction over wetlands to the full extent of their authority, with the exception of using the "Migratory Bird Rule." *Id.* In particular, the guidance stresses that both interstate and navigable waters and their tributaries remain jurisdictional, as do the wetlands adjacent to each. *Id.* It also suggests that isolated, nonnavigable, intrastate waters might be jurisdictional to the extent that the degradation of these waters affects jurisdictional waters. *Id.* However, the memorandum failed to provide much guidance on the meaning of important terms in the *SWANCC* decision such as "significant nexus," "adjacent," and "tributary."

On January 10, 2003, the Corps and EPA issued a joint news release vowing to protect America's wetlands and again asserting their narrow interpretation of this Court's holding in *SWANCC*. *See*, EPA-Corps News Release, January 10, 2003, *available at* http://www.epa.gov/owow/wetlands/Press-Logo.pdf. That statement announced that the agencies were issuing advance notice of proposed rulemaking to "solicit from the public data and information to clarify the extent of the Clean Water Act coverage in light of *SWANCC*."[8] *Id.* In addition to inviting public comment on a proposed rule, the news release also highlighted the

[8] *See also*, Advanced Notice of Proposed Rule Making on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1,991 (January 15, 2003).

important role of States in protecting waters outside of the scope of federal jurisdiction following *SWANCC*. *Id.*

The Corps also provided the following clarifications concerning its jurisdictional view over wetlands:

> (1) Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).
>
> (2) In light of *SWANCC*, field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in "Migratory Bird Rule." (3) In light of *SWANCC*, field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over isolated non-navigable intrastate waters based on other types of interstate commerce links listed in current regulatory definitions of "waters of the US."

Id. The news release further highlighted that "[a]lthough the *SWANCC* decision limits federal CWA jurisdiction over isolated, intrastate, non-navigable waters and wetlands, other federal or State laws and programs still cover these waters and wetlands." *Id.*

To date, no new rules have been issued by the Corps or EPA addressing federal CWA jurisdiction. Thus, while the Corps and EPA attempt to diminish the effect and reach of this Court's holding in *SWANCC*, it is unclear whether further regulations will have a determinative effect on the future scope of federal jurisdiction under the CWA. Yet, it is certain that the response of the Corps and EPA to *SWANCC* has failed to resolve the dispute over

federal CWA jurisdiction. Accordingly, this Court should grant the Petition to resolve this dispute.

C. Congress And The States Have Been Unable To Clarify CWA Jurisdiction Following *SWANCC*.

Congressional response to *SWANCC* is unlikely to occur through either amendment to the CWA or more sweeping wetlands regulation, thus, leaving the federal government uninhibited from expanding its jurisdictional reach under the CWA to isolated, nonnavigable, intrastate waters. This is evident with two failed attempts by Congress to enact versions of the Clean Water Authority Restoration Act ("CWARA") in 2002 and 2003. *See*, CWARA of 2002, S. 2780, 107th Cong., 2d Sess. (2002); CWARA of 2002, H.R. 5194, 107th Cong., 2d Sess. (2002); CWARA of 2003, S. 473, 108th Cong., 1st Sess. (2003); CWARA of 2003, H.R. 962, 108th Cong., 1st Sess. (2003). Both versions proposed unsuccessfully to redefine the intent of Congress to extend protection under the CWA to all wetlands, including isolated, intrastate waters.

On March 17, 2005, a third version of the CWARA was introduced in the House of Representatives. *See*, CWARA of 2005, H.R. 1356, 109th Cong., 1st Sess. (2005). Like its predecessors, the CWARA of 2005 would delete the term "navigable waters of the United States" from the CWA and replace it with a broad definition of "waters of the United States."[6] *Id.* Regardless of what Congress does, this Court

[6] Under the CWARA of 2005, "waters of the United States" would be defined as "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent

(Continued on following page)

must address, as is requested by Petitioner in this case, whether the Commerce Clause gives Congress the authority to regulate isolated, intrastate wetlands in light of *SWANCC*.

SWANCC undoubtedly has provided an opportunity for States to employ their regulatory authority over land and waters to demonstrate their commitment to wetland protection. *See*, Part I, *supra*. At the time of this Court's decision in *SWANCC*, only fifteen States had laws in place to protect wetlands. *See*, John Kusler, *The SWANCC Decision; State Regulation of Wetlands to Fill the Gap*, March 4, 2004, *available at* http://www.aswm.org/swp/theSWANCCdecision9.pdf. However, since the *SWANCC* decision, many States have implemented statutes aimed at protecting wetlands, while many others are attempting to modify current water pollution statutes to include wetlands protection. *See*, Jason Killheffer, *Connecticut's Inland Wetlands & Watercourses Act After Queach v. Inland Wetlands Commission: A "Safe Harbor" In a Sea of Regulatory Confusion*, 23 QLR 1149, 1149-50 (2004). Further such action by the States, consistent with their authority under the Constitution, must await a ruling from this Court confining Congress to its limited constitutional role under the Commerce Clause.

Accordingly, the conflict and confusion among the Courts of Appeals, administrative agencies, and the States over the scope of federal jurisdiction under the CWA may

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streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." H.R. 1356, §§ 4-5.

be resolved only by this Court. Thus, this Court should grant the Petition.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court grant the Petition for *Writ* of *Certiorari*.

Respectfully submitted,

WILLIAM PERRY PENDLEY, ESQ.*
**Counsel of Record*
CHRISTOPHER T. MASSEY, ESQ.
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

Dated: April 4, 2005